Supreme Court, U.S.
FILED

No. 03 . 924 OCT 13 2003

IN THE

SUPREME COURT OF THE UNITED STATES

Willie Ray Hubbard - PETITIONER

v.

United States of America – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Imhotep Alkebu-lan
Counsel of Record
Post Office Box 31107
Jackson, MS 39286
(601) 353-4455
Mississippi Bar No. 10592

QUESTIONS PRESENTED

I. WHETHER THE DISTRICT COURT ERRED IN REFUSING APPELLANT'S PROPOSED JURY INSTRUCTION ON DURESS?

II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL AFTER THE INSUFFICIENT EVIDENCE PRESENTED?

III. WHETHER THE COURT ERRED BY IMPOSITION OF A FIFTY-THOUSAND DOLLAR ($50,000.00) FINE AFTER IT INITIALLY IMPOSED A THIRTY-FIVE HUNDRED DOLLAR ($3,500.) FINE?

LIST OF PARTIES

(X) All parties appear in the caption of the case on the cover page.

( ) All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

( ) For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

( ) reported at _____; or,
( ) has been designated for publication but is not yet reported; or,
(X) is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

( ) reported at _____; or,
( ) has been designated for publication but is not yet reported: or,
( ) is unpublished.

( ) For cases from **state courts**:

The opinion of the highest state court to review the

merits appears at Appendix _____ to the petition and is

( ) reported at _____; or,
( ) has been designated for publication but is not yet reported; or,
( ) is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

( ) reported at _____; or,
( ) has been designated for publication but is not yet reported; or,
( ) is unpublished.

JURISDICTION

(X) For cases from federal courts:

The date on which the United States Court of Appeals decided my case was May 28, 2003.

( ) No petition for rehearing was timely filed in my case.

(X) A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 15, 2003, and a copy of the order denying rehearing appears at Appendix ____B_____.

( ) An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

( ) For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

( ) A timely petition for rehearing was thereafter

denied on the following date: _____,

and a copy of the order denying rehearing appears at Appendix _____.

( ) An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 29, Federal Rules of Criminal Procedure

Title 18, United States Code, Section 922(g)(1)

Title 18, United States Code App. Section 1202 (a) (1)

U.S.S.G. 5E1.2 (d) (1)

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION OF THE COURT BELOW

On August 30, 2001, a Criminal Complaint was filed in the Southern District of Mississippi by Agent Todd Kennedy of Alcohol, Tobacco, and Firearms charging Willie Ray Hubbard (hereinafter referred to an Appellant) with being a felon in possession of a firearm, a violation of 18 U.S.C. Section 922 (g)(1). (R.1/2). On August 30, 2001, an arrest warrant was issued by United States Magistrate Judge Louis Guirola, Jr. (R 1/7). On September 6, 2001, the Federal warrant was executed and the defendant appeared before United States Magistrate Judge Louis Guirola, Jr. for his initial appearance. (R 1/8). On this same date, the defendant was released on a twenty-five thousand dollar ($25,000.00) unsecured bond with bond

supervision to include the standard conditions of release, as well as home confinement with electronic monitoring. (R. 1/1-12).

On September 25, 2001, a Federal grand jury for the Southern District of Mississippi returned a one-count indictment against Willie Ray Hubbard charging him with felon in possession of a firearm, a violation of 18 U.S.C. 922(g)(1). (R.1/13). On October 29, 2001, an arraignment was held before United States Magistrate Judge Louis Guirola, Jr., where the defendant entered a plea of not guilty. (R 1/22). Several pre-trial motions were filed by appellant's counsel and trial commenced on June 17, 2002. (R1/71)

At the end of the government's case in chief, appellant's counsel made a Rule 29 Motion for a Judgment of Acquittal based on the insufficiency of the evidence. (R 3/388).

The Trial Court denied the motion and appellant called

his one and only witness. (R 3/395). Appellant rested and both the government and appellant began to provide the jury instructions they felt were applicable to their case. (R. 3/399).

Appellant built his entire case around the theory that if the government could prove it's case, the defendant was not guilty because of duress and/or necessity. Appellant submitted the duress instruction and the Trial Judge refused to give it. (R. 3/408). This decision was clearly erroneous and should be reversed.

After closing arguments, the case went to the jury. The jury was out for nearly two hours, when they wrote a letter to the Trial Judge saying they were hung-up. (R. 3/464). After a quick smoke break, the jury reluctantly came back with a verdict of guilty. (R. 3/465).

On October 10, 2002, appellant was sentenced to a term of one hundred twenty (120) months imprisonment with the

Federal Bureau of Prisons. (R. 3/39). After sentencing your appellant to serve a term of one hundred and twenty (120) months in prison, the Court addressed the fine issue.

Based upon the pre-sentence report, the Court found that your appellant did not have the ability to pay an immediate fine within the guideline range, so he imposed a partial fine of thirty-five hundred dollars ($3,500.00). (R. 4/41). However, after doing so the trial judge had some reservations and decided to increase the fine to fifty thousand dollars. ($50,000.00) for two reasons, one because he could not increase the length of imprisonment and two because of assets that the trial court thought appellant may have

owned, even though there was no basis for the increase in the record. (R. 4/41-44).

The Judgment and Commitment Order was filed by the

trial court on October 23, 2002. Thereafter, on October 23, 2002, your appellant filed his timely Notice of Appeal to United States Court of Appeals for the Fifth Circuit. On May 28, 2003, the Fifth Court affirmed the decision of the United States District Court for the Southern District of Mississippi. Appellant subsequently filed a Petition For Rehearing and on July 15, 2003, Treating the Petition For Rehearing En Banc as a Petition For Panel Rehearing, the Petition for Panel Rehearing was denied. It is from the above that this Petition for Writ of Certiorari is presented.

REASONS FOR GRANTING THE PETITION

The instant case focuses on appeal issues, which affect a large part of the prison population in that it addresses a common charge: Convicted felon in possession of a weapon. Case law supports that there was conflicting law between the Circuit Courts and case law, which is difficult to reconcile in that different courts, even in the same circuit, have used different standards to determine when a convicted felon in possession of weapon may be exempt from the statute to avoid punishment. In the instant case, the Fifth Circuit of Appeals has attempted to reconcile case law on this issue. By its own admission, in the case of United States v. Fair, 979 F. 2d 1037 (5th Cir. 1992), has attempted to reconcile the case law which it states has "divergent views" in different cases in the same Circuit. This case focuses on those divergent views and underscores the need for clear and consistent law, which affects such a large

part of the population. The issues are addressed below.

I. WHETHER THE DISTRICT COURT ERRED IN REFUSING APPEALLANT'S PROPOSED JURY INSTRUCTION ON DURESS?

The question before the Court is whether the District Court abused its discretion in refusing to instruct the jury on the affirmative defense of duress. In affirming the District Court decision, the Appeals Court determined that evidence was not sufficient to allow a reasonable jury to conclude that Hubbard was in danger of imminent bodily harm during the entirety of his possession of a firearm on or about August 4, 2001 and therefore, no instruction was warranted.

The pivotal issue is whether evidence is sufficient to allow a jury instruction on duress to be presented to the jury. United States v. Posada Rios, 158 F. 3d 832 (5th Cir 1998). See also, United State s v. Panter, 668 F. 2d 268 (5th Cir. 1982). In Panter, the Court held that a convicted felon, reacting out of

reasonable fear for life or safety of himself, in actual physiccourse of conflict that he did not provoke, takes temporary possession of a firearm for the purpose of defending himself, he is not guilty of violating the statute prohibiting convicted felons from carrying firearms.

Notably, in Panter, evidence was adduced at trial that Panter had purchased a gun and owned it for several months prior to a shooting incident which led to his prosecution. Panter denied owning the gun and argued that he took temporary possession of someone else's gun in order to defend himself. In that case, the Appeals Court reversed and remanded the District Court decision, emphasizing that the instruction should have been given to the jury thereby allowing the jury the opportunity to believe or disbelieve the government's version or the defendant's version of the facts.

The Appellate Court, in instant case, primarily relied on

United States v.Harper, 802 F.2d 115 (5th Circuit 1986)_ for support of its decision that the instruction was properly refused. The facts in Harper, however, are most distinguished from the facts in the instant case. The defendant in Harper testified that he purchased a gun for protection and gave it to his fiancée. Unlike the facts of the instant case, there was no evidence that Harper was in danger of imminent bodily harm at the moment he purchased the gun. Therefore, the Court of Appeals correctly concluded that the defendant could not be entitled to a self-defense or justification instruction.

In the instant case, the evidence as to whether defendant was in possession of a gun only during his endangerment or prior to his endangerment was controverted. The judge based his refusal to issue an instruction on his determination that one of required elements for granting the instruction was not met. Specifically the Court reasoned that the defendant placed

himself in a position either negligently or wrecklessly of having to engage in criminal conduct viz., being a convicted felon with a weapon, though the reason offered may be self defense. However, just as in Panter, this evidence was controverted by the defendant and warranted an instruction. In the instant case, the testimony of almost all of the government witnesses stated that Hubbard was in danger if imminent bodily harm, was in fact shot, and at some point, came into sudden possession of a gun to defend himself immediately after having been shot IN THE BACK. Four government witnesses gave testimony consistent with the defense theory of duress and two government witnesses gave testimony consistent with the prosecution. Nevertheless, it was uncontroverted that the defendant was shot in the back. Under the facts and evidence presented, the evidence of the defendant's endangerment through no fault of his own, if not convincing, was certainly

sufficient for an instruction. Whether the defendant was actually endangered through no fault of his own, was a question for the jury to decide and the Court should have presented a duress instruction. By refusing to grant the instruction, the Court invaded the province of the jury and the decision should be reversed and remanded.

II. WHETHER THE DISTRICT COURT ABUSED IT'S DISCRETION IN NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OFF ACQUITTAL AFTER THE INSUFFICIENT EVIDENCE PRESENTED?

The second issue raised on appeal is whether the evidence was sufficient to support a conviction. The standard for reviewing sufficiency of the evidence to support a conviction is " whether a reasonable jury could find that the evidence establishes the guilt of the defendant beyond a reasonable doubt". United States v. Gonzalez-Rodriguez, 966

F. 2d 918 (5th Cir. 1992); ..."We view the evidence most favorable to the verdict... and reverse the conviction only if the evidence, viewed in that light gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged. See, United States v. Sanchez, 961 F. 2d 1169 (5th Cir. 1992).

The instant case is among the rare cases wherein the government has failed to prove guilt, *beyond a reasonable doubt.* A main government witness, Officer Steve Pazos, testified that he responded to a shooting which the government argues involved the defendant. Pazos testified that there was no evidence of a shooting found, that there were no witnesses who stated that they saw anything and that therefore, he did not even do a report. (R. 2/119; 2/136). Another government witness, Yolonda Rice, testified that the only time she saw defendant with a gun was after he was actually shot in the back

and was attempting to defend himself. (R. 2/196-197 ; 8/199). Another witness, Tenisha Barnes, testified that she saw nothing because she did not have her glasses on. (R. 3/278).

Still another government witness, Melvin McGowan, testified that he did not observe defendant with a gun until the actual shooting at which time defendant was shot in the back. Rory Breland, another witness, testified that the only time he saw appellant shoot was in self-defense. There were only two government witnesses, Tonya Bussey and John Rice who testified they saw defendant with a gun prior to the actual shooting.

Based on the inconsistencies and contradictions of the testimony separately and as a whole, no reasonable jury could have found that the evidence presented was sufficient to establish guilt beyond a reasonable doubt. Significantly, the

jury was so confused that they were initially deadlocked (R. 3/464). Appellant urges that the judgment of acquittal should have been granted and that the Court should now reverse.

III WHETHER THE COURT ERRED BY IMPOSITION OF A FIFTY-THOUSAND DOLLAR ($50,000.00) FINE AFTER IT INITIALLY IMPOSED A THIRTY-FIVE HUNDRED DOLLAR ($3,500.00) FINE?

Addressing the fine, the issue is whether the D.C. abused its discretion in imposition of $50,000.00 fine. In the instant case, the Court of Appeals affirmed the District Court's imposition of a $50,000.00 fine. The Court of Appeals ruled that Hubbard failed to fulfill his burden to show that he was unable to pay a fine and that he was not likely to become able to pay a fine. The Court further reasoned that because the District Court did not adopt the findings of the Pre-Sentence Report (PSR) with respect to a fine, and then depart from the

PSR recommendation, the District Court was not required to make specific findings showing that it considered the relevant factors.

However, the record in this case clearly demonstrates that the District Court based its ruling primarily on the PSR. Specifically, the Court, in addressing the burden of proof stated that the Court could consider a PSR, at least those parts of it that were unchallenged. In further reference to information from the PSR, the District Court gave a recitation of vehicles and other items that were found during a home investigation. (Sentence Hearing Transcript; 8/14, 38; 9-13/43). This information from the PSR was the sole basis for the District Court reversing itself as to the fine. Initially, the Court ordered a fine of $3,500.00 (R. 4-8/41) stating that the defendant did not have the present ability to pay a fine within the guideline range based on the PSR. However, after considering other

statements by the Probation Officer, the District Court increased the fine to $50,000.00 without making findings showing that it considered any relevant factors. See United States v. Fair. 979 F. 2d 1041 (5th Cir. 1992).

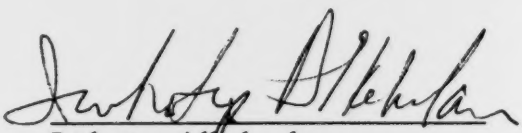
The appellant would submit that there is ample evidence in the record indicating the inability of the appellant to pay a fine. Testimony at the appellant's sentencing hearing was that the appellant's personal assets consisted of $200.00 and some lawn tools. Further, appellant submits that the other assets that the judge considered from the statements of the probation officer were not his, but owned by his wife and/or her partner in a company. (R. 16-20/43; 10-14/ 44). Significantly, there was no unequivocal evidence that the appellant's assets consisted of anything other than $200.00 and

lawn tools. Consequently, the Court erred not making specific findings showing that it considered relevant factors in determining appellant's ability to pay a $50,000.00.The decision of the Court of Appeals should be reversed and remanded.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,



Imhotep Alkebu-lan
Post Office Box 31107
Jackson, MS 39286
(601) 353-4455

Date: December 16, 2003

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 02-60923
Summary Calendar

United States
Court of Appeal
FILED
May 28, 2003
Charles F. Fulbruge, III
Clerk

UNITED STATES OF AMERICA

Plaintiff—Appellee,

versus

WILLIE RAY HUBBARD,

Defendant—Appellant

Appeal from the United States District Court
for the Southern District of Mississippi
ISDC No. 2:01-CR-20-1

Before JONES, STEWART and DENNIS, Circuit Judges.

PER CURIAM:

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* Pursuant to 5th CIR. R. 47. 5, the court was determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

Appendix A

Willie Ray Hubbard appeals from his conviction and sentence for being a felon in possession of a firearm. 18 U.S.C. SS 922 (g) and 924 (a) (2). He argues that (1) the district court abused its discretion in refusing to instruct the jury on the affirmative defense of duress, (2) the evidence was insufficient, and (3) the district court abused its discretion in sentencing him to pay a $50,000 fine.

Because duress is an affirmative defense, a defendant must present evidence of each of the elements of the defense before it may be presented to the jury. See United States vs. Posada-Rios, 158 F.3d 832, 873 (5th Cir. 1988). There must "exist [] evidence sufficient for a reasonable jury to find in his favor." Matthews v. United States. 485 U.S. 58,63 (1988).

After a thorough review of the record, we have determined that the district court did not err in refusing to

instruct the jury as to duress. The evidence was not sufficient to allow a reasonable jury to conclude that Hubbard was in danger of imminent bodily harm during the entirety of his possession of a firearm one or about August 4, 2001. See United States v. Harper, 802 F 2d 115, 118 (5th Cir. 1986); United States v. Panter, 688 F. 2d 268, 272 (5th Cir. 1982)

In view of the abundant evidence that Hubbard possessed a firearm on or about August 4, 2001, and taking into account Hubbard's stipulation that the firearm in question traveled in interstate commerce, as well as his stipulation that he had a prior felony conviction, the evidence was sufficient to support his conviction. See United States v. Gresham, 118 F. 3d 258, 265 (5th Cir. 1997).

In determining the amount of a fine, the district court must consider "the need for the combined sentence to reflect the seriousness of the offense (including the harm of lose to the

victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence." U.S.S.G. S 5E1.2 (d) (1). Hubbard failed to fulfill his burden to show that he was unable to pay a fine and that he was not likely to become able to pay any fine. See United States v. Fair, 979 F. 2d. 1037, 1041 (5th Cir. 1992); U.S.S.G. s 5E1.2(a). Accordingly, we have determined that the district court's imposition of a $50,000 fine was not abuse of its "considerable discretion." United States v. Matovsky, 935 F. 2d 719, 722 (5th Cir. 1991), see United States v. Altamirano, 11 F. 3d 52, 53-54 (5th Cir. 1993). Further, because the district court did not adopt the findings of the Presentence Report (PSR) with respect to a fine, and then depart from the PSR's recommendation, the district court was not required to make specific findings showing that it considered the relevant factors. See Fair, 979 F. 2d at 1041.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U. S. Court of Appeal

No. 02-60923

FILED

July 15, 2003

UNITED STATES OF AMERICA

Charles R. Fulbruge, III

Plaintiff – Appellee

clerk

v.

WILLIE RAY HUBBARD

Defendant – Appellant

Appeal from the United States District Court for the Southern District of Mississippi, Hattiesburg

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ON PETITION FOR REHEARING EN BANC

(Opinion 05/28/03, 5 Cir., ____, _____ F.3d _____)

Appendix B

Before JONES, STEWART and DENNIS, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel no judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. App. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. App. P. and 5th CIR. R. 35), Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

"S/Edith H. Jones"

United States Circuit Judge